

BEFORE THE FEDERAL ELECTION COMMISSION

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) **MUR 5842**
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COMMISSION
OFFICE OF GENERAL
COUNSEL

2008 DEC 12 A 10 51

**RESPONSE OF RESPONDENT ECONOMIC FREEDOM
FUND TO THE COMPLAINT IN MUR 5842**

By and through the undersigned counsel, Respondent Economic Freedom Fund (hereinafter "EFF") hereby files this response to the complaint in this matter. Because the complaint fails to state a violation of the Federal Election Campaign Act of 1971 (as amended) (hereinafter the "Act"), we respectfully request that the matter be dismissed.

I INTRODUCTION

Respondent EFF is an unincorporated association located in California. It is registered with the Internal Revenue Service as a political organization under Section 527 of the Internal Revenue Code, and has publicly disclosed both the sources and amounts of its funding, as well as its spending, in periodic reports filed with the IRS.

The mission of the EFF is to educate citizens on issues of public importance related to public policy – specifically, the economic and related impacts of certain legislative and other official acts of elected officials – as well as influence the legislative and other official actions of public officials. Earlier this year, the EFF produced materials distributed to the public that were so intended, and discussed such issues. None of these materials expressly advocated the election or defeat of a clearly identified Federal candidate; none referenced candidacy, elections, Election Day, voting on

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The EFF commented on and critiqued the official actions of a dozen public officials. Half of these officials were not Federal candidates. Moreover, the EFF's activities had been substantially completed about one month prior to the election – and thus before the complaint was filed. All the materials produced by the EFF have been publicly available on its website.

The Complainants, Democracy 21 and the Campaign Legal Center, are well-known to the Commission, having filed countless complaints over the years, very few of which had any merit. And the current complaint is no different. In fact, the current complaint is remarkably similar to several others filed against other organizations, as Complainants themselves note. See Complaint Para. 48, n. 38. Wrong on both the law and the facts, it is a mish-mash of already rejected legal theories, outright misstatements of the law, factual assumptions, half-truths and errors. As is their usual practice, the complaint was designed to generate press coverage. It was accompanied by a long-winded press release, and attached to it are a stack of "exhibits" the size of the New York City phone book. Of course, what the complaint fails to mention is that these so-called "exhibits" are nothing more than information that is publicly available (and has been so for quite some time).

Ultimately, the complaint asserts that EFF ought to have filed with the Commission as a “political committee.” This accusation is without merit. The EFF’s

¹ Nor did any of EFF's solicitations for funding reference any Federal candidates or elections. See 69 FR 68,057 ("[indicate] that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate").

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major purpose is not to influence the nomination or election of a particular candidate or candidates for federal office, and it has not made any expenditures or otherwise produced materials that expressly advocate the election or defeat of a federal candidate. Thus, the activities of the EFF are beyond the jurisdiction of the Commission.

II. ANALYSIS

A. EFF is Not a "Political Committee"

"Political committee" is defined by the Act as "any committee, club, association, or other group of person which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(4)(A). The Supreme Court, to avoid vagueness problems with this statutory language, construed "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Buckley v. Valeo, 424 U.S. 1, 79 (1976). Thus, the definition of "political committee" is quite narrow; the Supreme Court has construed the term to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* In other words, the Act does not reach groups "engaged purely in issue discussion," but instead only reaches "that spending that is unambiguously related to the campaign of a federal candidate" – specifically, "communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.*

1. Express Advocacy

Even the Complainants agree that none of the EFF's materials expressly advocate the election or defeat of a clearly identified candidate, but instead are limited to critiques

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of legislative voting records. *See* Complaint Para. 14 – 21. Confronted with this reality, the Complainants take matters into their own hands; they rewrite Buckley, mix in the “promote, attack, support, oppose” language applicable to political party committee activities, and set forth an entirely new definition of political committee status and express advocacy. But as the Commission already knows, this argument – which is a rewriting of the definition of “political committee” – has already been advanced by Complainants and rejected by the Commission. *See* FEC Minutes, FEC Agenda Document 04-77 (Aug. 19, 2004) at 9.

Worse, the legal theory advanced by Complainants – that express advocacy is no longer the applicable standard, and merely referencing a public official who also happens to be a federal candidate somehow is enough to trigger Federal regulation – is contradicted by their own comments filed previously with the Commission:

What this means, in short, is that the Commission cannot, and should not, by rulemaking, subject public communications . . . to the campaign finance laws beyond the current rules that apply to “express advocacy” and “electioneering communications.”² Furthermore, neither the Commission nor Congress can apply a non-“bright-line” test such as “promote, support, attack or oppose” to the uncoordinated communications of non-profit groups or other corporations. Unless and until Congress acts³ . . . groups are subject only to the “express advocacy” and “electioneering communications” tests for classifying when their public communications fall under the regulation of the federal campaign finance laws.

² Of course, the “electioneering communication” ban is inapplicable here, as EFF is an unincorporated entity, and neither accepted nor spent corporate funds. The Commission’s own publications make clear that the EFF, as an unincorporated 527 organization, “may . . . make electioneering communications.” *See* FEC Brochure on Electioneering Communications.

³ As the Commission also knows, Congress has not amended the definition of “political committee,” and thus the construction set forth by the Buckley Court remains the law of the land. Although there have been bills introduced in the House and Senate that would change the definition of “political committee,” none have been signed into law. The most successful of these, S. 2349, has languished in conference since May and was not acted upon before the 109th Congress adjourned. Ultimately, the fact that these bills are even pending demonstrates that activities of the sort conducted by EFF are perfectly legal under current law.

Comments filed by Democracy 21, the Campaign Legal Center and the Center for Responsive Politics in response to the Commission's Notice of Proposed Rulemaking 2004-6.

2. Without Express Advocacy, the "Major Purpose" Test is Irrelevant

Complainants also advance their usual argument regarding the so-called "major purpose" test. But this, too, has already been rejected by the Commission. In rejecting the invitation to redefine "political committee," the Commission stated:

The comments raise valid concerns that lead the Commission to conclude that incorporating a "major purpose" test into the definition of "political committee" may be inadvisable. Thus, the Commission has decided not to adopt any of the foregoing proposals to revise the definition of "political committee." As a number of commenters noted, the proposed rules might have affected hundreds or thousands of groups engaged in non-profit activity in ways that were both far-reaching and difficult to predict, and would have entailed a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000 and 2002 and when it substantially transformed campaign finance laws through BCRA. Furthermore, no change through regulation of the definition of "political committee" is mandated by BCRA or the Supreme Court's decision in McCormell. The "major purpose" test is a judicial construct that limits the reach of the statutory triggers in FECA for political committee status.

69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004).

3. No EFF Materials Contained Express Advocacy

Turning to the EFF's materials (all of which are publicly available on its website), none expressly advocate the election or defeat of a federal candidate. Critically, the Complainants concede this point, and are unable to point to anything that even they deem to be express advocacy. This is not surprising, as the EFF materials merely discuss the public legislative record and related issues, in a rather straightforward, factual way. Hardly an "attack" as suggested by the complaint, by modern standards EFF's materials

are fairly tame, and are devoid of unnecessary rhetoric. The materials state facts (and for the sake of argument, opinion), not election-related advocacy.

For example, EFF produced some materials that critiqued Congressman Alan Mollohan's official actions, and that those official actions have prompted an investigation by the U.S. Department of Justice. According to news reports (repeated in the EFF materials), Mollohan, a member of the powerful House Appropriations Committee, funneled at least \$250 million of taxpayer money into organizations he helped set up – and the employees of those groups were generous to Mollohan, giving his campaign \$400,000 – and his own personal fortune rose due at least in part with some dealings with those same people. Meanwhile, Mollohan had voted against several pieces of legislation that would have been a significant economic benefit for his constituents. Not only is there no express advocacy, there is nothing campaign-related about any of this. The portions of the materials referenced by Complainants – that “Mollohan’s vote is bad medicine for West Virginia seniors” (emphasis added) and that he “betrayed West Virginia families” – are statements of fact (or, for the sake of argument, opinion), not advocacy.

The same is true of other EFF materials.⁴ Even the portions signaled out by Complainants are statements of fact – for example, John Barrow’s vote for Nancy Pelosi for Speaker, or voting to benefit trial lawyers, or Leonard Boswell’s votes for taxes, or

⁴ This is true regardless of whether one looks to the notion of so-called “magic words” listed by the Court in *Buckley*, or the Commission’s regulation (which EFF sees as unconstitutionally vague and chilling of the free exercise of First Amendment rights) found at 11 C.F.R. § 100.21(b). Ultimately, even assuming *arguendo* that one could imagine some sort of election-related message in EFF’s materials, the materials are without question suggestive of numerous other, non-election meanings.

Darlene Hooley's votes for pork barrel spending. None of these statements constitute express advocacy, or can otherwise be characterized as election-related.

The Complainants completely miss the mark in describing activities in Indiana – sworn statements contradict the complaint's assertions. At issue was an Indiana state law regarding the use of automatic dialing machines. EFF intended to conduct research regarding the mood and views of citizens of that state regarding issues of public importance, including the legislative record of public officials.⁵ The vendor performing the research used auto-dialed phone calls in connection with gathering information. The Attorney General of the state, despite no history of enforcement, took the position that state law prohibits the use of auto-dialers, and as a result, a business entity somehow affiliated with the vendor hired to conduct the research filed a Declaratory Judgment action in Federal court, arguing among other things that Federal law preempts Indiana state law, and that its business on behalf of numerous clients would be adversely affected by the Attorney General's newly-created legal theory.

Critically, Complainants are completely wrong when they claim the calls were intended to influence the November election – sworn statements prove otherwise. The plaintiff in the Federal action stated under oath that it had been involved in “public policy” and “issue” campaigns, and specifically stated that its system allows the called party to “voice their opinions to [sic] important policy questions,” and identified the EFF “Indiana Media Market Issues ID Survey” by reference. In addition, the vendor contemporaneously confirmed in writing that “calls that [it] made on behalf of EFF (under its contract with EFF's vendor) to Indiana residents in September of 2006 were

⁵ EFF conducted no other activity in Indiana – there were no public communications such as television ads or direct mail.

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only for issue development, and done without coordination with any political parties or candidates." Thus, as is the case with much of the complaint, its bluster on activity in Indiana is wrong on the facts, and irrelevant as a matter of law.

4. Even under the "Major Purpose" Test, EFF is Not a Political Committee

Although irrelevant under the holdings of Buckley, other factors nonetheless demonstrate why EFF is not a "political committee," and does not have the "major purpose" of electing Federal candidates.

a. EFF's purpose is not election-related

What the Complainants fail to understand is the real purposes of the EFF activities that they cite in the complaint: to bring to the public's attention certain official actions of public officials that are in some way inconsistent with the values and economic interests of the people those officials purport to represent, and upon which our country was founded. In many ways, the ultimate intent of the materials is to influence the actions of the identified elected official, and move their legislative votes on certain issues away from the left and to the right.⁶ Election day is irrelevant to this purpose – instead, it is a much more far-reaching and policy driven approach.

⁶ Ultimately, by influencing the public officials' legislative and other official acts, those public officials face the much more difficult choice of representing the values of those they are elected to represent, or voting lock-step with their party leadership – two goals not mutually exclusive when seeking re-election. But, failing to vote with party leadership is detrimental to a public official's aspiration to climb the proverbial ladder within his or her own party structure, thus compromising the official's ability to be selected or appointed to posts within the party. For example, the fact that Alan Mollohan is now subject to a Federal criminal investigation, and the resulting public outcry, forced his removal as the Ranking Member of the House Ethics Committee by then-Minority Leader, now Speaker-elect, Nancy Pelosi.

b. Timing

And then there is the timing. After all, much of the EFF's activities occurred while the relevant legislative body was in session, and with the realization that Congress was going to continue to be in a lame-duck session long after the election. In fact, the EFF activities cited in the complaint occurred about a month or more before the November election, and were not in any way done in proximity to it.

c. Election results

Not only were EFF's activities not intended to influence Federal elections, they did not in fact influence Federal elections. The officials critiqued by EFF in the materials cited in the complaint all won re-election – some by significant margins.⁷ This, too, demonstrates the lack of election-influence of the EFF materials.

d. Half of the public officials critiqued were not Federal candidates

Of the twelve public officials whose official acts were critiqued by the EFF, half were not Federal candidates. This leaves no doubt that the EFF's major purpose (assuming *arguendo* that major purpose is at all relevant absent express advocacy) was something other than the nomination or election of a particular candidate or candidates for Federal office. See FEC v. GOPAC, 917 F. Supp. 851 (D.D.C. 1996) (further clarifying the language of Buckley and narrowing the definition of political committee).

B. The Commission Cannot Now Declare EFF a Political Committee

For the Commission to now change course, and redefine "political committee" now as suggested by Complainants, would be improper.

⁷ For example, Congressman Mollohan won reelection with 64% of the vote.

1. The Commission Lacks Jurisdiction

First, to now attempt to declare EFF a political committee would require the Commission to *sua sponte* expand its own jurisdiction. But of course, Congress sets the jurisdiction of the Commission through statute, as limited by the Courts – and that jurisdiction does not reach the activity cited in the complaint. Recognizing this, the Commission has previously declined to expand the definition of “political committee” without specific mandate from Congress. See 69 FR 68,065.

2. Arbitrary and Capricious

Second, such after-the-fact decision-making would be arbitrary and capricious, and an abuse of the Commission’s authority. The Commission has never itself defined “political committee” through regulation, and has rejected requests to do so. See 69 FR 68,056. At least one group has sought guidance through the Commission’s advisory opinion process, but the Commission declined to answer the questions asked. See AOR 2003-37. Thus, the Commission cannot now invent new legal theories to govern conduct after such conduct has occurred.

3. First Amendment

That after-the-fact invention of legal theories is improper is particularly true in instances that involve core speech (critique of the official acts of public officials) that is at the heart of the protections guaranteed by the First Amendment. Any sort of vague, *ad hoc* rule governing such an area is an unconstitutional restriction on speech, and certainly chills the free exercise of such rights.

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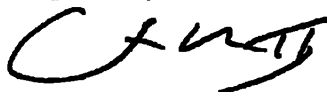
4. Equal Protection

Enforcement here would violate the equal protection guarantees afforded groups such as EFF. The number of complaints filed by Complainants against some 527 groups, and the lack of public Commission action on such matters (even several years after-the-fact), coupled with the number of groups that apparently operate free of Commission entanglements, shows that any such enforcement would be selective at best, thus violative of the equal protection guarantees and fundamental fairness.

III. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the complaint be **DISMISSED**.

Respectfully,



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